

**Brian Soja v. WCAB (Hillis-Carnes Engineering Associates)**

455 C.D. 2011 - Filed November 7, 2011

Issues: (1) Whether compensation benefits can be suspended on the basis of video surveillance alone and (2) whether the Board erred by not applying the correct burden of proof because once the claimant established a disability, the burden shifted to Employer to prove that his continued loss of earnings was not caused by his work injury?

Answer: (1) No. (2) No.

Procedural History: The claimant filed a petition to reinstate temporary total disability benefits. The Worker's Compensation Appeal Board affirmed the WCJ's decision, reinstating disability compensation for a limited period of time and suspending it thereafter. The claimant appealed and the Commonwealth Court affirmed.

Summary of Facts: In 2005, while working as a laborer, the claimant sustained an injury to his lower back when he pulled a heavy piece of equipment from a ditch. The work injury aggravated the claimant's underlying degenerative disc disease in his lower back. Employer-One accepted this injury under an agreement of compensation payable, and the claimant returned to work soon thereafter. In January 2006, while working for a new employer (Employer-Two), the claimant sneezed, thereby exacerbating his 2005 back injury. Employer-One accepted liability for an aggravation of the claimant's underlying disc disease and paid benefits for one month. In October 2006, claimant was working for a third employer (Employer-Three) and while bending over to tie his shoe at home, he experienced intense pain to his back that radiated down his left leg and into his foot. The claimant filed a reinstatement petition, seeking temporary total disability as of November 1, 2006. Employer-One moved to have Employer-Three joined as a defendant. The claimant testified on his behalf in February 2007, November 2007, and April 2008. The claimant and Employer-One also presented medical testimony.

Employer-One then offered a surveillance video of the claimant, which was done on April 24, 2008, the date of the final hearing. The video showed the claimant walking to and from the WCJ hearing limping and leaning on a cane. After the hearing, the claimant is seen driving in his pickup truck to a house where he picks up a passenger, and the two travel over thirty miles to an automotive salvage yard. The claimant climbs out of the truck without difficulty and does not use a cane to walk in the salvage yard. The claimant lies on the ground to remove a part from the bottom of a van and places a hand jack under the van. After his friend changes the tire, the claimant uses a wrench to tighten the lug nuts on the tire. As he does so, the claimant bends and twists his body. The claimant is seen jumping into the back of his truck and throwing auto parts into it. At no point in the surveillance video is the claimant seen using a cane or walking

## November Case Law Update

with a limp. The tape shows the claimant leaning on the van and holding his back while he moves to a standing position.

The WCJ accepted the opinion of the claimant's medical experts that the claimant's ongoing pain symptoms were due to the 2005 work injury, but rejected their opinions that the claimant was unable to work. The WCJ also rejected the claimant's testimony and that of his friends. The WCJ concluded that as of November 1, 2006, the claimant was disabled from performing his usual occupation as a truck driver by reason of his pain symptoms related to his 2005 work injury. The WCJ granted benefits through April 23, 2008, and suspended them as of April 24, 2008. The WCJ found that the claimant failed to prove a continued inability to work as of the day of the video. The claimant appealed to the Board arguing that Employer did not prove a basis for the WCJ to suspend benefits because the video was not substantial evidence. The Board agreed that a video alone cannot support an employer's suspension petition; however, it was the claimant's burden to establish ongoing disability after the date of reinstatement. The Board held that the video supported the WCJ's decision to discredit the claimant, his fact witnesses, and his medical experts. Thus, the Board affirmed the decision of the WCJ.

On appeal to the Commonwealth Court, the claimant argued that the Board erred because compensation benefits cannot be suspended on the basis of video surveillance and that the Board did not apply the correct burden of proof because once he established a disability, the burden shifted to Employer to prove that his continued loss of earnings was not caused by his work injury.

The Court explained that where an employer files a petition to reduce a claimant's benefits from total to partial disability, the employer has the burden of proof. In that situation, a video is inadequate evidence standing alone. Rather, the video must be examined by a physician or vocational specialist who can offer evidence of what kind of jobs the claimant can do, other than his pre-injury job. Likewise, where the employer has filed a termination or suspension petition, a video will not be sufficient to satisfy the employer's burden of proof.

Holding: The Commonwealth Court held that: (1) the claimant bore the burden to prove that pain, which allegedly caused his loss of wages, had persisted through pendency of the proceeding, and (2) the evidence was insufficient to sustain the claimant's burden of proof that his loss of wages continued through the pendency of the reinstatement petition. Accordingly, the Court affirmed the decision of the Board.

Practical Application: Surveillance video will not be sufficient evidence to satisfy an employer's burden of proof in a termination petition, a suspension petition, or a petition to reduce benefits from total to partial disability. However, surveillance video may be used to impeach credibility, including that of expert witnesses, and to establish facts. If the claimant's case was based solely

## November Case Law Update

on testimony or facts that were discredited by the surveillance video, a WCJ will likely find that the claimant failed to satisfy its burden.

**Donald Argyle v. WCAB (McKeesport)**

No. 43 C.D. 2011 – Filed September 2, 2011 – Reported November 10, 2011

Issue: Whether the claimant bore the burden to establish a change in condition from a prior WCJ decision in order to succeed on a modification petition which alleged a specific loss of his right forearm and/or hand?

Answer: Yes.

Procedural History: A WCJ denied the claimant’s petition to modify compensation benefits, finding that the claimant failed to establish that his work-related injury resolved into a specific loss under Section 306(c) of the Act. The WCJ further determined that the claimant’s modification petition must be denied under principles of *res judicata* and *collateral estoppels*. The claimant appealed and the Appeal Board affirmed. The claimant then petitioned for review of the order of the Board. The Commonwealth Court affirmed the Board’s decision.

Summary of Facts: On March 31, 1993, the claimant sustained an injury to his right wrist while working for Employer. Employer issued an NCP with a description of injury of “Sprain Right Wrist” and claimant began receiving temporary total disability benefits. The claimant returned to work for a short time. He then ceased working and filed a petition to reinstate benefits, which alleged that his work-related injury resolved into a specific loss of his right forearm and/or hand. Employer denied the allegations of the claimant’s petition to reinstate.

Subsequently, Employer filed a petition to suspend benefits, alleging that the claimant had refused to return to light duty. The claimant filed an answer, denying that he was capable of performing Employer’s light duty position. The claimant’s reinstatement petition and Employer’s suspension petition were consolidated. The WCJ to whom they were assigned denied both petitions, finding that (1) the claimant failed to establish that his work-related injury resolved into a specific loss and (2) Employer’s light duty position was not within the claimant’s physical limitations. The claimant did not appeal.

The claimant then filed a petition to modify compensation benefits, which again alleged that his work-related injury resolved into a specific loss of his right forearm and/or hand. Employer denied the claimant’s petition to modify. The claimant presented testimonial evidence and claimed that he had absolutely no use of his right hand. At a hearing before the WCJ, the claimant agreed that “basically” there has been no change in his condition since he last testified in support of his prior reinstatement petition. The claimant and Employer also presented medical testimony which conflicted over whether the claimant had lost the use of his arm, hand, and wrist. The WCJ credited the doctor who opined that the claimant had not lost the use of his right hand, wrist, or forearm.

## November Case Law Update

The WCJ denied the allegations of the claimant's petition to modify compensation benefits, finding that the claimant failed to establish that his work-related injury resolved into a specific loss under Section 306(c) of the act. The WCJ further determined that the claimant's modification petition must be denied under principles of *res judicata* and *collateral estoppels*. The claimant appealed and the Board affirmed. The claimant petitioned for an appeal of the Board's decision to the Commonwealth Court.

The Commonwealth Court stated that in order to maintain his modification petition, the claimant had the burden to prove, through the presentation of medical evidence, that his condition changed after the WCJ's decision in 2000. Thus, the Court explained that the claimant's case had to begin with the adjudicated facts by the WCJ, and then work forward in time to show the required change in condition.

Holding: The Court held that the claimant failed to satisfy his burden of establishing that his physical condition had changed.

Practical Application: In order for a claimant to establish a specific loss, he must present medical evidence to show that the loss of use is permanent and for all practical intents and purposes. If the medical evidence presented is contrary to the established facts in the record or based on assumptions not in the record, the medical opinion is not competent. A claimant fails to demonstrate a change in physical condition if he or she presents medical evidence that predates the prior WCJ Order that determined the extent of the claimant's injury.

**Bureau of Workers' Compensation v. WCAB (Excalibur Insurance Management Service)**

376 C.D. 2011 – Decided November 17, 2011 – Filed November 17, 2011

Issues: (1) Whether the WCJ and the Board have subject matter jurisdiction to adjudicate the employer's request for supersedeas reimbursement; (2) whether substantial evidence supports the conclusion that two-thirds of the monies paid to the claimant from July 25, 2007 – November 14, 2008 represented workers' compensation benefits; and (3) whether the employer met all of the criteria set forth in Section 443(a) of the Act with respect to the aforementioned payments?

Answer: (1) Yes. (2) Yes. (3) Yes.

Procedural History: The employer filed a termination petition, which also included a request for supersedeas. The termination petition alleged that the claimant was fully recovered and was able to return to work without restriction. The request for supersedeas was denied but a WCJ granted the termination petition. No appeal was taken to the WCJ's decision. The employer filed a Petition for Supersedeas Reimbursement, which was granted by a WCJ. The Bureau of Workers' Compensation appealed the WCJ's decision to the Appeal Board. The Board affirmed the WCJ's order and the Bureau appealed to the Commonwealth Court.

Summary of Facts: The claimant suffered a work injury while working as a police officer. As a result, the employer paid the claimant on-going compensation for his injury. On appeal, the Court concluded, inter alia, that both the WCJ and the Board had subject matter jurisdiction over the employer's request for reimbursement for its portions of payments made as workers' compensation benefits. The Court also held that two-thirds of the amount the employer, who was self-insured, paid under the Heart and Lung Act represented workers' compensation benefits and thus, the employer was entitled to Supersedeas Fund reimbursement. Because it was determined that workers' compensation benefits were not payable, the employer was entitled to be reimbursed for any payments that it made which represented workers' compensation benefits.

Holding: The Board's order was affirmed. The Court stated that (1) unless there is evidence to the contrary, as a matter of law, when an employer is self-insured for worker's compensation purposes and it is required to pay Heart and Lung payments in addition to workers' compensation benefits, two-thirds of the amount paid automatically represents workers' compensation benefits, and (2) employer met statutory criteria under Workers' Compensation Act for Supersedeas Fund reimbursement for payments it made as its own insurer to workers' compensation claimant representing workers' compensation benefits.

Practical Application: An employer is entitled to reimbursement for any payments which represent workers' compensation benefits. Two-thirds of the amount an employer pays under the Heart and Lung Act represents workers' compensation benefits.

**Joseph Bucceri v. WCAB (Freightcar America Corporation)**

2021 C.D. 2010 – Decided November 22, 2011 – Filed November 22, 2011

Issue: (1) Whether supplemental unemployment benefits received by the claimant during a period of layoff prior to his work-related injury should be included in the calculation of his average weekly wage and (2) whether unemployment compensation received by the claimant during a period of layoff prior to his work-related injury should be included in the calculation of his average weekly wage?

Answer: (1) Yes. (2) No.

Procedural History: The claimant filed a review petition alleging that his compensation benefits had been incorrectly calculated under a supplemental agreement, based upon an incorrect AWW. Concurrently, the claimant filed a penalty petition in which he alleged that Employer had failed to pay the correct amount of benefits. Employer filed answers to both petitions denying all of the material allegations raised therein. The WCJ issued an order granting the claimant's review petition, which served to raise the claimant's AWW from \$319.36 to \$562.21. The WCJ denied the claimant's penalty petition, concluding that the claimant had failed to sustain his burden of proving that Employer violated the Act by failing to pay the correct amount of benefits. Employer appealed to the Board, which reversed the WCJ's decision. Thereafter, the claimant petitioned the Commonwealth Court to review the order of the Board.

Summary of Facts: The claimant sustained a work related injury to his left knee while in the course and scope of his employment. Disability benefits were calculated under § 309 of the Act and set at a rate of \$287.42 per week based upon an AWW of \$319.36 per week. The claimant filed a petition to review alleging that his compensation benefits had been incorrectly calculated, due to an incorrect AWW. The claimant also filed a petition for penalties in which he alleged that Employer had failed to pay the correct amount of benefits. Employer filed answers to both petitions, denying all of the material allegations raised therein. The WCJ issued an order granting the claimant's review petition, which served to raise the claimant's AWW from \$319.36 to \$562.21. The WCJ denied the claimant's penalty petition, concluding that the claimant had failed to sustain his burden of proving that Employer violated the Act by failing to pay the correct amount of benefits.

Employer appealed to the Board, which reversed the WCJ's decision. The Board explained that the Supreme Court has determined that UC benefits were to be excluded from the calculation of AWW under section 309 of the Act. The Board also noted that because SUB payments are intended to be paid when an employee is no longer working for an employer, they are likewise to be excluded from the calculation of the claimant's AWW under section 309.8. Accordingly, the Board issued an order reversing the WCJ's decision and stating that the claimant's AWW was correctly calculated to be \$319.36 per week.

## November Case Law Update

Thereafter, the claimant petitioned the Commonwealth Court to review the order of the Board. On appeal, the claimant contended that the Board erred in reversing the WCJ's decision granting his review petition. The claimant asserted that both the unemployment compensation (UC) benefits he received and the supplemental unemployment benefits (SUB) payments made under the collective bargaining agreement should have been included in the calculation of his average weekly wage under § 309 of the Act.

The Court concluded that the Board properly excluded UC benefits from the AWW calculation under well settled law. However, the SUB payments, which the Court classified as entitlements earned through and exchanged for services performed for the employer should not have been excluded, as such exclusion artificially deflated the calculation of the claimant's AWW under § 309 of the Act based upon inaccurate measure of his earning history and earning capacity.

Holding: The Board's decision excluding UC benefits was affirmed. The Board's decision with respect to SUB payments received pursuant to the CBA was reversed. The case was remanded for recalculation of the claimant's AWW. Thus, (1) unemployment compensation (UC) benefits received by workers' compensation claimant during period of lay-off could not be included in the calculation of his AWW for purposes of determining his disability benefits, but (2) supplemental unemployment compensation (SUB) benefits should have been included in the calculation of claimant's AWW.

Practical Application: Include supplemental unemployment compensation in the calculation of a claimant's AWW. Do not include unemployment compensation in a claimant's AWW.



**Colin Woodley v. WCAB (J.P. Mascaro)**

62 C.D. 2011 - Decided November 30, 2011 – Filed November 30, 2011

Procedural History: The claimant petitioned for review of the Board's order which affirmed the decision of a WCJ dismissing his claim petition.

Issue: Whether the Board erred in affirming the WCJ's denial of his benefits because there was no proof that the claimant was incarcerated after a conviction?

Answer: No.

Summary of Facts: The claimant, who was incarcerated, was working in a work release program when he sustained a gash in his right leg while lifting some trash. Due to the injury, the claimant was removed from the work release program. Initially, the claimant filed a claim petition and testified on his own behalf. The WCJ concluded that, although the claimant sustained his burden of proving that he suffered a work-related injury, he was not entitled to benefits under Section 306(a.1) of the Act, which states that "[n]othing in this act shall require payment of compensation...for any period during which the employe [sic] is incarcerated after a conviction..." The claimant argued on appeal that there is no evidence or proof that he was ever convicted, thus, the WCJ erred as a matter of law.

After review of the record, the Commonwealth Court rejected the claimant's argument. While there was no proof that the claimant was convicted, the Court explained that he credibly testified that he obtained his job by way of a work release program from a correctional facility. Under the County Intermediate Punishment Act, a work release program is an intermediate Punishment, which is defined as "[a] residential or nonresidential program provided in a community for eligible offenders." 42 Pa. C.S. 9802. This section also defines "eligible offender" as "a person convicted of an offense who would otherwise be sentenced to a county correctional facility..." The Court also referenced other sections of the CIPA which referenced sentencing guidelines and bodies. Because work release is a sentence under the Act, it must necessarily follow a conviction. Therefore, by virtue of the claimant's participation in the work release program, the Court concluded that he was "incarcerated after a conviction" within the meaning of Section 306(a.1) of the Act.

Holding: The Court affirmed the order of the WCAB and held that the claimant's claim petition was properly dismissed.

Practical Application: If a claimant is involved in a work release program, even if evidence of a conviction is unavailable, his benefits may be suspended.